No. 76-179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

LOUIS A. MARKERT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION NO. 76-179 AND BRIEF AMICUS CURIAE IN SUPPORT OF CERTIORARI.

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MOTION OF NATIONAL CONFERENCE OF STATE LEGISLATURES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION NO. 76-179

The National Conference of State Legislatures respectfully moves the Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorneys for the parties herein has been obtained. The consent of the Solicitor General is transmitted herewith for filing with the clerk of this Court. The consent of the petitioner is being transmitted directly to the clerk of this Court by his attorneys.

This applicant is the only national organization created and funded by the nation's state legislatures, and among its primary concerns is the independence of all legislatures. The interests and concerns of this applicant are the implications and impact of the decision sought to be reviewed herein upon such independence and upon the rights and privileges secured by the several State Constitutions.

The Petition for Certiorari of the petitioner herein, which has but recently come to our attention, argues that the denial of recognition of the Illinois constitutional Speech or Debate provision creates a federal-state imbalance, but the discussion therein of this point is inadequate in that its concern is limited to one state, and one constitutional provision of that single state, whereas the interest of this applicant extends to the several states, and to the rights and privilege assured by the Constitutions of such several states. This applicant has no reason to believe that argument on this point will be made complete in this Court.

Wherefore, the National Conference of State Legislatures respectfully requests the Court to permit it to file the brief amicus curiae which is submitted herewith.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR NATIONAL CONFERENCE OF STATE LEGISLATURES IN SUPPORT OF CERTIORARI

The National Conference of State Legislatures hereby submits its brief in support of the Petition filed in *Louis A. Markert*, Petitioner v. *United States of America*, No. 76-179, for writ of certiorari to review the judgment of the United States Court of Appeals on July 9, 1976.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, in *United States v. Craig*, et al, No. 74 Cr. 877 is not officially reported but is printed in Markert Appendix (App. A, pp. 1-10). The first opinion of the United States Court of Appeals for the Seventh Circuit reversing the Order of Supression under the same title, No. 75-1592 of that Court, was entered on January 5, 1976, and is officially reported at 528 F.2d 773 and, also, is printed in Markert Appendix (App. B pp. 11-33).

Rehearing En Banc was granted by the Seventh Circuit. The second opinion of the United States Court of Appeals for the Seventh Circuit, again reversing the order of supression was entered on July 9, 1976, and is not yet officially reported but is printed in Markert Appendix (App. C, pp. 34-36).

JURISDICTION

The first decision of the United States Court of Appeals was filed on January 5, 1976 (Markert App. B). The second decision of that Court was filed July 9, 1976 (Markert App. C). Markert's Petition was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(I).

QUESTIONS PRESENTED

Whether this Honorable Court should issue its Writ of Certiorari to review the action of the Court of Appeals in this most extraordinary case where (1) state constitutional rights and privileges — absolute within the boundaries of such states — are declared nullified by the existence of federal evidentiary rules; (2) five of the seven judges to consider this matter in the Northern District of Illinois and in the Seventh Circuit Court of Appeals were of the distinct opinion that the final result is erroneous; (3) federal-state balance would logically require recognition by the executive and judicial branches of the United States Government of state constitutionally granted rights and privileges — in complete harmony with the Constitution of the United States and for the most part fashioned after it; (4) the decision extant jeopardizes all state constitutionally granted rights and privileges; (5) the concept of co-existing dual sovereignities of equal dignity is imperiled.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, Clause 1, and Article 6, Clause 2, of the United States Constitution and Rule 26 of the Rules of Criminal Procedure (Title 18, U.S.C.A.) and Rule 501 of the Federal Rules of Evidence (Title 28, U.S.C.A.) are involved, and are set forth in Markert petition, pp. 4 and 5.

STATEMENT OF THE CASE

The statement of petition, Louis R. Markert at pp. 5 through 10 of his Petition includes a full analysis of the pertinent facts and of the decisions of the United States District Court for the Northern District of Illinois and of the United States Court of Appeals for the Seventh Circuit and in the interest of brevity, we adopt such Statement.

ARGUMENT

1. One of the functions of this applicant is to advise members of the legislatures of the several states on matters such as are involved in this case. In view of the divisive opinions of the Seventh Circuit and in view of this Court's opinions on the same subject as they relate to federal legislators, we deem it of extreme importance that this Court speak definitively in this area as to the rights of state legislators.

The Opinion of the first panel below held in substance that members of our Conference enjoyed the privileges of the constitutions of their own states on this subject. Subsequently, in a sharply divided opinion, the Seventh Circuit reversed its stand in an en banc hearing and its then position was that the matter of speech or debate so far as a state legislator was concerned was relegated to an evidentiary question in litigation in the federal courts. We cannot believe and earnestly beseech this Court that the Court of Appeals for the Seventh Circuit should not speak for the 48 states having such a provision in their State constitutions.

The National Conference of State Legislatures is particularly concerned that this case stands for a rule of law which undoubtedly will have a chilling effect upon the independence of state legislators. As the original panel of the United States Court of Appeals for the Seventh Circuit stated (Markert, App. 21):

> "Although the speech or debate privilege embraces notions of the separation of powers among co-equal branches of government, its primary message is that legislatures must be able to discharge their lawful responsibility in an atmosphere free from the threat of interference by other governmental units. A legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence; whether the threat emanates from the local or national executive makes no difference."
>
> "In the present case, the United States Attorney commendably conceded at the oral argument that a refusal to recognize a speech or debate privilege for state legislators would have an inhibiting effect on the conduct of members of the Illinois General Assembly. This threat to the legislature's independence is fundamentally inconsistent with the idea of legislative action reflected in the policy, purpose and history of the privilege and inherent in the words: 'for any Speech or Debate in either House, they shall not be questioned in any other Place,' U.S. Const. Art. 1 § 6."

It is important that we adequately advise our members. If, contrary to their understanding, they are prone to criminal liabilities because of the presence of the United States government as a sovereign — though not as to the presence of any other sovereign within the United States — they are entitled to be so advised. No doubt such advice would have not only a chilling effect upon incumbents, but would grievously limit the number of potential persons of legislative stature

who would be willing to seek office, and risk the misunderstanding or ambition of a federal prosecutor. Thus the position of our organization is more inclusive than that of the petitioner, Louis A. Markert, who stands before this Court.

2. Our examination of the civil cases appears to uphold this right of state legislators even in matters affecting civil rights.

Even with the civil rights exception to the common law immunity, no case exists where the exception was applied to a Legislator while acting in the legislative process. We refer the Court to its own decision in *Tenney* v. *Brandhove*, 341 U.S. 367, 376, where this Court applied, in the absence of a state constitutional protection (one of two states which has no Speech or Debate provision), the protection of the United States Constitution, from which it fashioned what it referred to as "common law" immunity. This appears to have been done to accommodate to the great majority of the states that fashioned their constitutions from the United States Constitution governing the same principle. However, in the presence of state constitutional provisions providing for speech or debate protection, the state provision has been recognized and enforced. *Fidtler* v. *Rundle*, 3 Cir., 497 F.2d 794, 798; *Doe* v. *McMillan*, 414 U.S. 306, 319. Cf. *Pearson* v. *Ray*, 386 U.S. 547. The few exceptions arise when the legislators go beyond the legislative process and into executive or judicial capacities. *Jordan* v. *Hutchinson*, 4 Cir., 323 F.2d 597, 599, 600 and cases cited therein pages 601-602.

Because civil rights violations usually have their counterpart in criminal proscriptions, it is felt that legislators should be able to rely upon the ongoing vitality of the state constitutions to protect them also against criminal prosecutions.

Our position that these authorities also protected against criminal proceedings within the scope of legislative activity

was bolstered by such cases as this Court's decision in *Johnson* v. *United States*, 383 U.S. 169, which in turn drew upon *Ex Parte Wason*, 4 QB 573, from which it quoted Mr. Justice Lush:

> "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House."

Further this Court in *Kilbourn* v. *Thompson*, 103 U.S. 168, drew upon *Coffin* v. *Coffin*, 4 Mass. 1, quoting:

> "And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against those rules." (See 103 U.S. at page 203-4)

3. The question presented here is whether the rules of evidence in the federal courts are sufficient to overcome these constitutional protections. It is our understanding that if a state, any state, was admitted to the Union after 1789, the common laws as of the date of admission controls. *Logan* v. *United States*, 144 U.S. 263, at 303. We also recognize that these principles are not strictly followed. At times this Court has examined state laws of evidence, even if incorporated in the state constitution, in the light of "general authority and sound reason" rejecting them where they are antiquated or inappropriate. However, we did not believe that in the light of this Court's decisions, particularly in *Johnson* and *Brewster (United States v. Brewster*, 408 U.S. 501), it could be considered that a state constitutional protection had become either antiquated or inappropriate. Thus it has been our understanding that as the state legislatures are controlled by their own constitutions, equally are they protected by them.

The National Conference of State Legislatures, in substance, is of the opinion that the United States of America struck a bargain with the individual states as each was admitted into the Union. The United States of America accepted the state constitutions as written, had the power of rejection as to any individual clause, and when the United States accepted the constitutions of the several states, the United States was and is bound by the provisions of the constitutions of the several states. It is our respectful submission that this Court act upon and ratify that acceptance.

This case represents a giant step in the history of the United States and its relationship with the several sovereign states, and it endangers the parity envisioned by the Framers.

> "The role of the states under the new federal constitution was also a central issue in the ratification debates. Opponents claimed that the new national government would soon engulf the states, eliminating all of their power and control over local affairs. See II Elliot's Debates, supra at 308 (New York), at 469 (Pennsylvania): III Elliot's Debates supra at 171 (Virginia). Yet in state after state speakers arose to assure their fellow delegates that the Constitution would work no such change; the states would remain an important unit of the government. See II Elliot's Debates, supra at 168 (Massachusetts), at 199 (Connecticut); IV Elliot's Debates, supra at 316 (South Carolina)."
>
> (Markert Appendix 20, 1st Decision C.A.7)

4. The continuing incursion by broad Federal legislation into matters ordinarily of pure state interest has been a subject of recent concern *(National League of Cities v. Usery*, 44 LW 4974). We recognize, and appreciate, the attempts of this Court to curtail such incursion where it precipitates state-federal conflict. If these speech or debate privileges dictated by the state constitutions are absolute within the state — as we believe they are — the presence of the fed-

eral government may by the fact of presence alone — obliterate that absoluteness. It is imperative to our general interest that we be advised under the Supreme authority of this Court whether our several constitutional protections — none in conflict with the Supreme law of the land — may be successfully eroded by the mere presence of the federal prosecutor.

Our interests surpass the interest of Markert. If one of our guarantees is subject to erosion, all guarantees are in peril. Markert's interest is comparatively pedestrian. Our interests would encompass a re-examination of all constitutional guarantees which we have heretofore considered impregnable within the State, in the absence of a direct attack thereon. We consider the stability of the Constitutions of the fifty states we represent to be imperiled by the decision herein.

CONCLUSION

Wherefore, this applicant respectfully suggests the public interest will be best served by a definitive statement of this Court at the inception of federal incursion into state constitutionally protected areas at this time, and prays its Writ of Certiorari issue.

Respectfully Submitted

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